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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

1998 Biennial Regulatory Review -- Repeal of Part 62 of the Commission's Rules	)))	CC Docket No. 98-195

COMMENTS OF MCI WORLDCOM

I. Summary

MCI WorldCom strongly encourages the Commission's to retain its Part 62 rules for dominant carriers. These rules provide needed protection against exclusive arrangements incumbent local exchange companies (ILECs) may for the first time exercise through vertical interlocks with companies in interexchange, internet, and information services markets. With the enactment of the 1996 Act, the blanket prohibition on Bell Operating Company purchase of any equity of a firm in downstream communications markets has been replaced by the right to obtain up to a 10 percent equity interest, without being subject to the separate subsidiary requirements of sections 272 and 274. The Commission's Part 62 rules remain an efficient means of preserving competitive interexchange, internet, and information service markets, because they screen potentially anticompetitive interlocks before damage can be done. Under the protections that flow from the Commission's 201, 272, and 274 authority, it may take years of repeated complaints before the pattern of abuse becomes visible. By that time, competition could be seriously undermined.

II. Introduction

Over a decade ago, the Commission determined that it was no longer necessary for non-dominant carriers to receive prior approval of interlocking directorates.[1] In this docket, the Commission seeks comment on the desirability of removing its remaining Part 62 requirements for dominant and non-dominant carriers.[2] The Commission tentatively concludes that the four aspects comprising its Part 62 rules should be repealed:

(1) the requirement to seek Commission approval if companies with interlocking positions with more than one carrier subject to the Act where one of the carriers is either a dominant carrier, or a carrier not yet determined to be non-dominant;[3]

(2) the requirement to demonstrate that the directors serve on companies with common ownership in order to be exempt from Part 62 rules, if dominant carriers are involved;[4]

(3) the requirement to report interlocking positions of more than one carrier subject to the Act involving non-dominant carriers, connecting carriers, cellular licensees operating in different geographic markets, and parents of carriers, to the Commission within 30 days after such interlock occurs;[5] and

(4) the requirement to report any change in Part 62 status to the Commission within thirty days.[6]

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[1] However, non-dominant carriers were still required to report their interlocking arrangement to the Commission. See Amendment of Part 62 of the Commissions Rules, First Report and Order, 101 FCC 2d 495, 495-96 (1985), *Part 62 Order*.

[2] 1998 Biennial Regulatory Review — Repeal of Part 62 of the Commission's Rules, Notice of Proposed Rulemaking, *Notice*, CC Docket No. 98-195, Released November 17, 1998.

[3] 47 C.F.R. § 62.1.

[4] *Id.* §§ 62.12, 62.25.

[5] *Id.* § 62.26.

[6] *Id.* § 62.24.

The Commission offers the following reasons in support of its tentative decision to eliminate preauthorization of interlocks involving dominant carriers, and reporting of interlocks for all carriers:

(1) the limited number of filings involving dominant carriers is attributable to the Clayton Act prohibition of interlocks in horizontal markets. The Clayton Act will continue to play this role even after the Commission's Part 62 rules are eliminated;[7]

(2) the interexchange marketplace no longer contains a dominant firm, and therefore, the "...harm the rule sought to prevent...no longer exists;"[8]

(3) the absence of a Clayton Act prohibition against vertical interlocking directorates suggests vertical interlocks are an insignificant competitive concern in regulated markets;[9] and

(4) its 201(b), 272(b)(3), and 274(b)(5)(A) authority will continue to prevent imposition of anticompetitive rates, terms, or conditions that might result from vertical interlocking directorates or horizontal interlocks involving firms that might otherwise be competitors.[10]

II. Competition is Inadequate, and Other Laws and Regulations are Insufficient, to Eliminate Existing Rules Governing Boards of Directors of Dominant Carriers

A. The Commission's Regulations are Responsible for the Limited Number of Part 62 Applications Involving Dominant Carriers

The Commission's first rationale for eliminating its Part 62 rules actually supports retaining these rules. It is undoubtedly true that the Clayton Act prohibition against interlocks involving companies in the same horizontal geographic or product market has limited the number of Part 62 applications that might otherwise have been made. As long as the Clayton Act

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[7] *Notice* at ¶ 7.

[8] *Notice* at ¶ 10.

[9] *Notice* at ¶ 7.

[10] *Notice* at ¶¶ 7-9.

continues to be interpreted unchanged, it will continue to play the same limiting role.

However, since the Commission's Part 62 rules cover broader areas of economic activity than the Clayton Act, such as whether the interlock precludes the competitive entry, it is also undoubtedly true that the Commission's Part 62 rules have played an equally important role excluding requests for interlocks among potential competitors. The limited number of filings is the result of both the Clayton Act and the Commission's Part 62 rules. The Commission has provided no basis for attributing the limited number of filings solely to the Clayton Act. Therefore, it may not rely on the retention of the Clayton Act to justify eliminating its Part 62 rules.

There have also been an absence of filings requesting preauthorization of vertical interlocks involving dominant telecommunications firms. This complete absence is attributable solely to the Modification of Final Judgement (MFJ), which prohibited Bell Operating Companies (BOCs) from having any equity interest in long distance or information service companies.[11] But unlike the Clayton Act, the MFJ has been replaced by the Telecommunications Act of 1996 (1996 Act). BOCs may now obtain a 10 percent or less equity interest in downstream long distance, internet, and information service companies, without triggering the separate subsidiary requirements of sections 272 and 274, since these vertical relations do not constitute affiliate relations. With respect to the BOCs, and with respect to independent local exchange carriers, the existing Part 62 rules are the only mechanism that operates to prevent anticompetitive conduct

[11] United States v. American Tel. and Tel Co., *Modification of Final Judgement*, 552 F. Supp. 131 (1982) at 227.

arising from a vertical interlock between these dominant firms and downstream long distance, internet, and information service firms. In the absence of such rules, the interlock would occur, and anticompetitive activity might result that harms other telecommunications and information services providers, and these providers would have recourse to "after-the-fact" remedies, such as complaints. In the instant case, an ounce of prevention appears to be worth a pound of cure.

B. Eliminating Part 62 Rules Could Have Especially Negative Consequences for Local Exchange Markets

The Commission tentatively concludes that since the interexchange marketplace is competitive, and interexchange companies are unable to cause harm from interlocking relations, there is no need for rules limiting interlocks.[12] The Commission notes that the local exchange market is not fully competitive, but downplays the risks from interlocks involving dominant firms by stating that "...the potential for anticompetitive conduct *may be* present."[13] Incumbent local exchange carriers (ILECs) indisputably remain dominant carriers, and therefore retain the ability to, and do, engage in anticompetitive behavior. There is no "may be" about the potential for anticompetitive conduct by ILECs.[14]

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[12] *Notice* at ¶ 10. MCI agrees that the interexchange marketplace is competitive, and supports the elimination of the remaining reporting requirements involving interlocks for nondominant carriers.

[13] *Ibid*, emphasis added.

[14] *See*, Federal Communications Commission Memorandum Opinion and Order in the Matter of the BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, October 13, 1998; Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to Provide

C. Part 62 Rules Are Needed to Protect Against Exclusive Arrangements ILECs May Now Exercise through Vertical Interlocks with Companies in Interexchange, Internet, and Information Services Markets

The Commission's third rationale for eliminating its Part 62 rules leaves important markets unprotected from anticompetitive influence that can be exercised by the ILECs. The Commission recognizes that the Clayton Act does not protect against potentially anticompetitive actions involving interlocks between firms operating in a vertical relation to each other, but suggests that the Clayton Act does not prohibit these interlocks because the potential for harm from vertical relations of any sort are limited, and that consequently, no rules addressing interlocking vertical directorates are needed.[15]

The Clayton Act's prohibition of horizontal interlocks is a *per se* rule violation — a practice considered so pernicious to competition that it is prohibited, regardless of its immediately observable competitive effect.[16] However, the absence of a *per se* violation does not obviate the

In-Region, InterLATA Services in Louisiana, CC Docket N. 97-231, February. 4, 1998; Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of BellSouth Corporation to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, December 24, 1997; Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, August 19, 1997; and Federal Communications Commission Memorandum Opinion and Order in the Matter of the Section 271 Application of SBC Communications, Inc., to Provide In-Region, InterLATA Services in Oklahoma, CC Docket No.97-121, June 26, 1997.

[15] *Notice* at ¶ 7.

[16] Vertical Restraint Guidelines, U.S. Department of Justice, Antitrust Division, *Vertical Restraint Guidelines* 1985, at ¶ 2.

need for *any* rules addressing vertical interlocks, as the Commission concludes.[17] Interlocks involving upstream or downstream companies are germane to the evaluation of nonprice vertical restraints.[18] While the Department of Justice (DOJ) states that vertical restraints generally are neutral with respect to competition, they may facilitate collusion among competitors or may be used by one or more competitors to exclude their rivals.[19] Moreover, DOJ specifically notes that competitive distortions from vertical relations are likely in rate regulated industries — i.e., an industry occupied by a dominant firm.[20]

History confirms the validity of DOJ's concern regarding competitive distortions from vertical relations in rate-regulated industries. DOJ's case against AT&T rested on the discrimination and exclusive arrangements that directors of the upstream local Bell Operating Companies (BOCs) exercised on behalf of its downstream long distance company, AT&T. The remedy, divestiture of the BOCs from AT&T, and the prohibition of the BOCs from entering long distance or information service markets amounted to a complete ban on vertical interlocking directorates between the dominant BOCs and any long distance or information service provider.

With the enactment of the 1996 Act, BOCs may now obtain a 10 percent or less equity interest in downstream long distance, internet, and information service companies, without being

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17 *Notice* at ¶ 7.

18 "Vertical restraints are arrangements between firms operating at different levels of the manufacturing or distribution chain...that restrict the conditions under which firms may purchase, sell, or resell." *Vertical Restraint Guidelines* at ¶ 1.

19 *Ibid*, at ¶3.2.

20 *Id.*, at ¶ 3.3.

subject to the separate subsidiary requirements of section 272, since these vertical relations do not constitute affiliate relations.[21] BOCs may now take advantage of exerting influence in downstream markets free of the separate subsidiary requirements of section 272. To date these vertical interlocks are fairly limited, since ILECs are still subject to preauthorization review of these interlocks under the Commission's Part 62 rules. However, current market conditions appear to be generating increased transactions that would be covered under the Commission's Part 62 rules. For example, SBC recently purchased a 4 percent stake in Concentric and internet service provider, with an option to purchase an additional 4 percent of stock in the next 3 years.[22]

D. Part 62 Remains an Efficient Means of Preserving a Competitive Market for Interexchange, Internet, and Information Service Companies that Remain Dependent on Dominant Providers of Essential Local Telephone Inputs

The previous discussion has shown that regulatory authorities have been vitally concerned about competitive abuses that might result from vertical interlocks between a dominant local exchange company and firms in downstream markets, and that they have dealt with these concerns primarily through structural mechanisms rather than behavioral mechanisms. In its Notice, the Commission contends that its 201(b), 272(b)(3), and 274(b)(5)(A) authority will continue to prevent imposition of anticompetitive rates, terms, or conditions that might result from vertical interlocking directorates.[23] However, the protections that flow from these authorities are

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21 See 1996 Act, §§3, 272.

22 *New Deal Turns Concentric Into IP Shop for SBC Communications*, ISDN News, November 3, 1998.

23 *Notice* at ¶¶ 7-9.

behavioral ones intended to discourage anticompetitive behavior by a dominant firm, and the remedies available to affected parties are *ex post.*

In contrast, structural remedies, such as those contained in the preauthorization review of the Commission's interlocking directorate rules, strive to limit the opportunities and incentives for dominant carriers to engage in anticompetitive behavior. Structural remedies are more efficient mechanisms of preserving competition when the structure of the market permits exclusive or preferential arrangements that may be hard to detect. In the absence of the Commission's Part 62 rules, a BOC that lacks 271 authority could purchase an interest of 10 percent or less in an interexchange carrier (IXC) without violating Section 271. In this case, the IXC may have access to information on a discriminatory basis that could benefit the IXC and make the BOC's interest more valuable. It may take years of repeated complaints before the pattern of abuse becomes visible under remaining regulatory review mechanisms. By that time, competition for specific services could be seriously undermined.

Under the Commission's Part 62 rules, the possibility of abuse is signaled prior to any action a dominant firm might be able to take in the marketplace. It is, therefore, the only efficient mechanism the Commission has to identify the possibility of subtle, hard-to-detect abuses involving dominant carriers and competitive firms operating in downstream interexchange, internet, and information service markets, before the abuses occur. The importance of retaining a screening mechanism to identify the possibility of abuses involving vertical relations is important in light of the Commission's decision to remove its ability to identify potential competitive abuses in the tariff process, since the Commission has no declared that dominant local exchange carrier tariffs are "deemed lawful." MCI WorldCom increasingly questions the ability of the Commission's tariff review process to identify and remedy the increasing number of questionable and anticompetitive relations between ILECs and downstream companies, affiliated and non-affiliated, now that it has dramatically "streamlined" its tariff review process.[24]

III. Conclusion

For the above-mentioned reasons, MCI WorldCom encourages the Commission to retain its current Part 62 rules for dominant carriers.

Respectfully submitted,
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December 14, 1998

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[24] These actions include: streamlined tariff filings; determining that the "deemed lawful" language of Section 402(b)(1)(A)(iii) of the 1996 Act precludes the Commission from awarding damages for the period that a streamlined tariff is in effect prior to a determination that the tariff is unlawful; requiring that petitions against LEC tariff filings that are effective within 7 or 15 days of filing to be filed within 3 days after the date of the tariff filing and replies 2 days after service of the petition; proposing to reduce the frequency with which independent audits of the cost allocations based upon the CAMs are required; reducing Uniform System of Accounts ("USOA") to reduce accounting requirements and to eliminate or consolidate accounts; exempting price cap local exchange carriers average schedule LECs, and all local non-dominant carriers from the section 214 requirements for new or extended domestic lines; eliminating the requirement that BOCs file Comparably Efficient Interconnection plans and obtain Common Carrier Bureau approval for those plans prior to providing new intraLATA information services.

Statement of Verification

I have read the foregoing and, to the best of my knowledge, information and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on December 14, 1998.

Lawrence Fenster

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Service List

I, Barbara Nowlin, do hereby certify that a copy of MCI WorldCom's Comments has been sent by United States first class mail, postage prepaid, hand delivery, to the following parties on this 14th day of December, 1998.

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